

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte YOSHITO SHIBAUCH,  
HIROSHI KONDO, HIROSHI AOYAMA  
and  
MASAYUKI GODA

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Appeal No. 2005-0719  
Application 09/675,671

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ON BRIEF

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Before GARRIS, WARREN, and OWENS, Administrative Patent Judges.  
GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal which involves  
claims 12-16.

The subject matter on appeal relates to a laminated  
cheese food. With reference to figure 7 of the appellants'  
drawing, the laminated cheese food comprises a multilayer

structure t produced by piling a plurality of laminated cheese foods, each of said plurality having at least three layers including two external layers A and B of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality, and an intermediate layer of platy food material being disposed between and being inherently capable of bonding to the two external layers of platy food material, wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality. Further details regarding this appealed subject matter are set forth in representative independent claim 12, which reads as follows:

12. A laminated cheese food, comprising:

a multilayer structure produced by piling a plurality of laminated cheese foods, each of said plurality of laminated cheese foods of the multilayer structure having at least three layers, the at least three layers including:

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled; and

an intermediate layer of platy food material, wherein the intermediate layer may be formed of a plurality of intermediate

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layers of platy food material which inherently bond together, the intermediate layer being disposed between and being inherently capable of bonding to the two external layers of platy food material,

wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

The references set forth below are relied upon by the examiner as evidence of obviousness:

Nakajima	4,670,276	Jun. 2, 1987
Mally et al. (Mally)	4,832,970	May 23, 1989
Mayfield	5,928,692	Jul. 27, 1999

All of the claims on appeal are rejected under 35 U.S.C. § 103(a) as being unpatentable over Mayfield in view of Mally and Nakajima.

We refer to the Brief and Reply Brief and to the Answer for a complete discussion of the opposing viewpoints expressed by the appellants and by the examiner concerning the above-noted rejection.

OPINION

This rejection cannot be sustained. Our reasons follow.

Concerning the distinction of appealed claim 12 relative to Mayfield and the issue of obviousness regarding this distinction, the examiner expresses her position on page 4 of the Answer in the following manner:

Mayfield does not specifically disclose two external layers of platy material containing cheese and at least one intermediate layer which is cheese different or the same from the external layers.

Mally et al disclose platy food material containing cheese. (See the abstract)

Nakajima discloses platy food material containing cheese. (See the abstract)

Mayfield discloses the food product may be comprised on any desired food materials. Thus, it would have been obvious to one skilled in the art to use any combination of food material to form food products having an assortment of taste, flavor and texture. For example, it would have been obvious to combine the platy food materials of Mally et al and Nakajima with a cheese to produce food product having the taste of meat, fish and cheese. It would also have been obvious to combine different type[s] of cheese such as cream cheese with cheddar cheese or

mozzarella cheese to obtain a food product with different cheese flavor, taste and appearance. The combination is endless and depends on the taste, flavor, texture, look desired. Mayfield discloses the individual slices are packaged together and since the slice has an edible film to prevent sticking, it is obvious the slice is releasable from adjoining slice.

Even assuming (without deciding) that all of the afore-quoted obviousness conclusions are correct, the examiner's rejection still would be improper. This is because the food product resulting from these obviousness conclusions would not correspond to the laminated cheese food defined by appealed independent claim 12.

As correctly argued by the appellants, and contrary to the examiner's belief, the presence of Mayfield's edible material or film prevents patentee's food product, even when modified in the manner proposed above, from satisfying the requirements of the independent claim before us. This is because claim 12 requires

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled . . . wherein each of the plurality of laminated cheese foods of

the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

Since the edible material or film of Mayfield indisputably does not contain cheese, this material or film cannot be regarded as the appellants' claimed "two external layers of platy food material containing cheese." Moreover, although patentee's food product when modified as proposed by the examiner would include layers of platy food material containing cheese, these layers would be located internally of the edible material or film and thus would not be "external layers" much less "external layers . . . having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled" as required by the claim under review. Thus, the examiner's finding that "the claims do not exclude the presence of the film [of Mayfield]" (Answer, page 5) is clearly erroneous.

The examiner also argues that the above discussed claim requirements are satisfied "[w]hen a film is not made and the film solution is sprayed onto the layers as shown in figure 1B" because "the [resulting] film material forms part of the layers 12, 14" (Answer, page 6). This finding by the examiner

likewise is clearly erroneous. The edible material 24 of Mayfield's figure 1B embodiment unquestionably does not somehow become "part of the layers 12, 14" (i.e., "external layers of platy food material containing cheese" as required by claim 12) as the examiner imagines. Mayfield's disclosure in lines 7-21 and particularly lines 17-18 of column 5 makes it clear that the edible material 24, though applied as a spray rather than a pre-formed film, becomes an edible film or layer on the food product rather than a material which is somehow comingled into the cheese product on which it is sprayed as the examiner seems to believe.

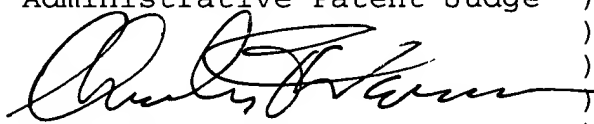
For at least the reasons set forth above, the examiner has failed to carry her burden of establishing a prima facie case of obviousness with respect to the independent claim on appeal. See In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). It follows that we cannot sustain the examiner's § 103 rejection of all appealed claims as being unpatentable over Mayfield in view of Mally and Nakajima.

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The decision of the examiner is reversed.

REVERSED

  
BRADLEY R. GARRIS )  
Administrative Patent Judge )

  
CHARLES F. WARREN )  
Administrative Patent Judge )

BOARD OF PATENT  
APPEALS AND  
INTERFERENCES

  
TERRY J. OWENS )  
Administrative Patent Judge )

BRG:psb

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